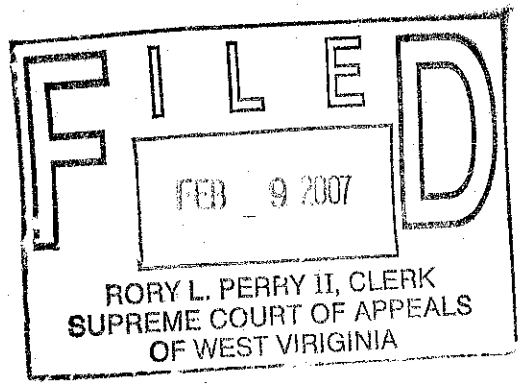
NO. 33222

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,

Appellee,

v.

JEREMIAH DAVID MONGOLD,

Appellant.

BRIEF OF APPELLEE STATE OF WEST VIRGINIA

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I.

KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

On September 7, 2004, a Hampshire County Grand Jury indicted Jeremiah David Mongold (hereinafter "Appellant") for violating West Virginia Code § 61-8D-2a(a), death of a child by a parent, guardian or custodian or other person by child abuse. (Record [hereinafter "R."] at 1.) On March 23, 2005, following a jury trial in the Circuit Court of Hampshire County, Appellant was found guilty. (R. 2221.) By Order dated November 23, 2005, Appellant was sentenced to serve a definite term of imprisonment of 40 years. (R. 1144-47.) Appellant now appeals the conviction.

II.

STATEMENT OF THE FACTS

Before the incident in question, Appellant lived in Shanks, West Virginia, with Shiloh Aumock, his wife of two weeks, along with Ms. Aumock's five-year-old son Logan, and two-year-old daughter Hannah. (R. 1572.)

On May 15, 2004, the day before the incident, Appellant was at home watching the two children while Ms. Aumock was at work. (R. 1573.) Appellant and the two children were playing outside when Hannah came running to Appellant holding her forehead and pointing to the family dog. (R. 1922.) Hannah insinuated that the dog had knocked her down while she was playing with it. (*Id.*) The injury gave Hannah a small red dot on her forehead; however, she told Appellant that she was okay and continued to play. (R. 1936.) Later that day, while playing with the water hose, Hannah fell off the deck. (R. 1923.) However, the deck was only approximately one foot to eighteen inches high and she landed in a mulch surface. (R. 1898.) Hannah did not appear hurt after falling and continued playing. (R. 1923.) When Appellant put Hannah to bed that night, she was still in good health. (R. 1580.)

According to Appellant, the only other possible source of Hannah's injuries occurred during the day of the incident, May 16, 2004. That morning, Logan woke Appellant to tell him that Hannah was awake. (R. 1924.) Appellant got Hannah out of bed and fed the children oatmeal. (*Id.*) After eating, Logan wanted to wrestle with Appellant; however Appellant wanted to play a less vigorous game. (R. 1582.) Appellant then played "airplane" with Logan while Hannah watched and smiled because she also wanted to play. (*Id.*) "Airplane" is a common childhood game where an adult lies on his or her back and puts the small child's belly on the adult's legs and feet, and while holding the child's hands, the adult's legs lift and twirl the child. (R. 1932.) Appellant then played "airplane" with Hanna for about four minutes. (R. 1582.) A few minutes after playing Appellant attempted to pick up Hannah, but she was limp and felt like Jello. (*Id.*) Appellant called 911 for help. (*Id.*)

When the ambulance arrived, two Emergency Medical Technicians (hereinafter "EMT") found Hannah lying on the kitchen floor. (R. 1504.) The EMTs quickly discovered that Hanna's

condition was "bad" because she was very diaphoretic and her hair was wet due to shock. (R. 1506.) Hanna was also barely breathing and her skin was turning blue. (R. 1507.) The EMTs also observed that Hanna had two small and faint bruises over her right eye. (*Id.*) In an attempt to explain Hannah's poor condition, an EMT asked Appellant a variety of questions including whether she could be choking, whether she had recently fallen, or whether she had taken a new medicine. (R. 1508.) Appellant answered "no" to these questions. (*Id.*)

The EMTs observed that Hannah was breathing only eight times a minute and her heart rate was only one-half of what it should have been. (R. 1510.) The EMTs remained on the scene for only approximately three minutes before an EMT picked Hannah up and put her in the ambulance. (R. 1509, 1513.) The EMT felt confident picking her up because Appellant indicated that she had not fallen, thus it seemed unlikely that her spinal column was damaged which would require C-spine immobilization before transport to the ambulance. (R. 1511.)

In the ambulance, the EMTs ruled out that Hannah's airways were blocked. (R. 1515.) In order to test Hannah's blood sugar, an EMT attempted to pierce her vein with a needle. (*Id.*) However, Hannah's body appeared to be shutting down as she did not respond to the pain of the needle prick and no blood came out of her veins. (*Id.*) The EMTs ruled out that her condition was caused by blood sugar levels because Hannah had eaten oatmeal that morning. (R. 1515-16.) The EMTs also ruled out that her condition was temperature related because she was not hot. (R. 1516.) The EMTs concluded that Hannah's condition was caused by a head injury or an allergic reaction. (*Id.*) The EMTs noticed that the small bruises on Hannah's head were becoming darker and larger. (R. 1517, 1530, 1552.)

En route to the hospital, the EMTs decided that Hannah's condition was serious enough to require helicopter transportation to a better equipped hospital in Maryland. (R. 1511, 1517.) The EMTs also decided to rendevous with a paramedic, who is authorized to perform several medical procedures EMTs are not allowed to perform. (R.1511, 1518.) When the paramedic examined Hannah in the ambulance, she determined that Hannah suffered from a head injury because of her symptoms and because her pupils were equal but sluggish. (R. 1562.)

When the ambulance arrived at the fire station, the medical transport helicopter was already circling overhead and landed within two minutes. (R. 1520.) Only approximately 15 minutes had passed from the time the EMTs arrived at Appellant's house to Hanna boarding the helicopter. (R. 1530.) A flight medic and the paramedic flew with Hanna to Cumberland Memorial Hospital in Maryland. (R. 1521.) Upon arrival, Hannah was in critical condition; she was not alert nor aware of her surroundings and she was hooked to a machine that helped her breathe. (R. 1599.)

A CAT scan performed on Hannah's head showed bleeding around the brain which indicated she was not suffering from meningitis. (R. 1603-05.) The CAT scan also revealed that Hannah was suffering from cerebral edema (brain swelling), a serious condition that can cause death. (R. 1606.) The CAT scan also revealed that Hannah had blood in the subarachnoid space (little layers of skin that protect the brain). (R. 1607.) There is not supposed to be blood in this area and only severe trauma, consistent with a fall from a building story or more or an automobile accident, can cause subarachnoid blood with cerebral edema. (*Id.*)

Hospital doctors were told that Hannah was knocked over by the family dog the day before. (R. 1602.) However, after seeing the intensity of Hannah's injuries, the doctors concluded that the trauma a child may receive from being knocked to the ground by a dog is not severe enough to cause

subarachnoid blood and cerebral edema. (R. 1607.) Additionally, the doctors did not believe that being knocked over by the dog caused the injury because cerebral edema typically occurs within hours of the trauma, not days. (R. 1607-08.) The results of the CAT scan also indicated that Hannah's injuries did not likely come from playing "airplane." (R. 1620.) The doctors also did not believe that a cumulative effect of being knocked down by the dog, falling off the deck, and playing airplane could cause the severe trauma. (R. 1622.)

After the CAT scan revealed the intensity of Hannah's injuries, the doctors at Cumberland Hospital decided to transport Hannah to Johns Hopkins Hospital in Baltimore. (R. 1609.) After arriving at Johns Hopkins, Hannah was placed in the intensive care unit. (R. 1630.) Her pupils had limited reflexes which indicated severe head trauma. (R. 1631.) A CT scan revealed that Hannah was suffering from subdural hemorrhages, which is areas of bleeding, in both front parts of her brain. (R. 1631-32.) There was also blood in the interhemispheric space, which is where the two sides of the brain come together. (R. 1632.) Tests to see if Hannah suffered from a condition that caused her to bleed easily were negative. (*Id.*) Toxicology screens of Hannah's blood and urine were also negative as were blood cultures that tested for infection. (R. 1633.) These tests, along with the severe nature of Hannah's injuries, led Johns Hopkins' doctors to believe Hannah suffered from either asphyxiation/strangulation or abusive head trauma. (R. 1636-43.)

Because of the suspicious nature of Hannah's injuries, the intensive care doctors contacted the Johns Hopkins "Child Protection Team," which consists of doctors and social workers who provide consultation to the hospital staff in cases of suspected child abuse. (R. 1624-25.) A physician with the child protection team asked Appellant and Ms. Aumock about Hannah's past medical history. The physician learned that Hannah was born premature; however, this seemed an

unlikely cause of her injuries because she had developed normally. (R. 1628.) The physician was also told that Hannah was knocked down by the family dog. (R. 1629.) This also seemed an unlikely cause of her injury because she appeared fine after the incident and played hard for the rest of the day. (*Id.*) The physician also dismissed the game of "airplane" as the cause of the injury because it was not reported that she had fallen during or after the game. (R. 1629-30.)

Tragically, Hannah's body was unable to heal the massive brain injuries she suffered. She died on May 18, 2004. (R. 1705.) After her death, Hannah was taken to the State of Maryland's Office of Chief Medical Examiner for an autopsy. The autopsy revealed that the small bruises on Hannah's forehead caused subgaleal hemorrhage on the skull surface. (R. 1707-08.) Subgaleal hemorrhage is bleeding within the scalp and on the skull surface. (R. 1708.) After shaving Hannah's head, a bruise on the back of her head, which resulted in hemorrhage of the underlying scalp, was revealed. (*Id.*) Additionally, there were two other areas of hemorrhage that could be seen only after the scalp was removed. (*Id.*) Hannah had also suffered from diastatic separation, which occurs when a brain is so full of fluid that skull bones that are normally held together separate. (R. 1709.)

The autopsy also revealed that Hannah's brain was covered in subdural blood which indicates a traumatic injury. (R. 1709-10.) The autopsy findings agreed with the Johns Hopkins doctors that Hannah had subarachnoid blood, which also results from traumatic injury. (R. 1710.) Hannah also showed signs of retinal hemorrhages, which are caused by significant trauma to the brain consistent with sudden stopping and going, on both of her eyes. (R. 1725, 1727.) Hannah also showed signs of subarachoid hemorrhage around the brain stem and spinal cord. (R. 1711-12.) Based on these autopsy findings, the pathologist concluded that Hannah had at least four distinct and significant

blunt impacts to her head, and that these injuries caused her death and were the result of homicide. (R. 724, 1728.)

III.

RESPONSE TO ASSIGNMENTS OF ERROR

The trial court did not abuse its discretion when it allowed cross-examination of Appellant regarding a previous child abuse incident because Rule 404(b) of the West Virginia Rules of Evidence allows such testimony. This evidence helped establish the identity and intent of the perpetrator, and also rebutted Appellant's claim that Hannah's injuries were the result of an accident. The testimony was relevant and more probative than prejudicial, and proper limiting instructions were given to the jury.

The trial court did not abuse its discretion when it allowed cross-examination of Shiloh Aumock regarding an incident that occurred at a company Christmas party which resulted in Appellant losing his job, because testimony about Appellant's job status and good family life were raised during Appellant's direct examination of witnesses.

Finally, the trial court did not abuse its discretion when it admitted autopsy photographs of Hannah into evidence because the photographs were relevant in illustrating the injuries Hannah suffered, and their high probative value in aiding the pathologist's testimony outweighed any prejudicial effect to the Appellant.

IV.

ARGUMENT

A. UNDER RULE 404(b) OF THE WEST VIRGINIA RULES OF EVIDENCE, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ALLOWED CROSS-EXAMINATION OF APPELLANT REGARDING A PRIOR CHILD ABUSE INCIDENT BECAUSE THROUGHOUT THE TRIAL APPELLANT MAINTAINED THAT HANNAH'S INJURIES WERE THE RESULT OF AN ACCIDENT. THE EVIDENCE OF THE PREVIOUS INCIDENT HELPED SHOW LACK OF ACCIDENT, THE IDENTITY AND INTENT OF THE PERPETRATOR, THE TESTIMONY WAS RELEVANT AND MORE PROBATIVE THAN PREJUDICIAL, AND PROPER LIMITING INSTRUCTIONS WERE GIVEN TO THE JURY.

The trial court did not commit error when it allowed the State to cross-examine Appellant about a previous child abuse incident. Throughout the trial, Appellant elicited testimony about his good relationship with children.[1] Additionally, Appellant advanced numerous theories to explain Hannah's injuries including that the injuries occurred from being knocked over by the family dog and falling off the deck.[2] Appellant also asked expert witnesses if playing "airplane" with Hannah,

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[1]Yana Blankenship stated that she felt comfortable with Appellant being around her children and would allow Appellant to babysit her children. (R. 1784.) Appellant's father testified that Appellant had a good relationship with, and took care of, Hannah and Logan. (R. 1847.) Nancy Moore also testified that Appellant was "really good with my children," and that she had no problem with Appellant being around her children. (R. 1866-68.) Ms. Aumock testified that Appellant had a good relationship with Hannah and Logan. (R. 1877-79.) In his direct testimony, Appellant stated that he had a "fairly good" relationship with the children and that he and the children enjoyed each other. (R. 1919.)

[2]While cross-examining EMT Brady, Appellant's counsel asked, "In your experience as an EMT, have you seen injuries that have occurred in one day and then didn't . . . manifest themselves until another day?" (R. 1551.) During cross-examination of Dr. Levita, Appellant's attorney asked, "Could the injury occur from the child falling from a deck?" (R. 1618-19.) During direct examination, Dr. Rosenberg, Appellant's expert, answered affirmatively to Appellant's question, "[A]re these injuries the type of injuries that could be consistent with play?" (R. 1800.) Appellant, during his direct examination, also testified that the dog had knocked over Hannah, that she had fallen off the deck, and that they played "airplane." (R. 1922-23, 1931-32.)

who was born premature, could explained the injuries due to poor coordination and underdevelopment.[3] Appellant's counsel argued that Appellant was a large man and could have accidentally hurt Hannah playing "airplane" because of his strong leg muscles, a point he emphasized several times by asking Appellant to stand up and show the jury how large he was compared to Hannah.[4] Appellant also offered an expert witness, Dr. Rosenberg, who stated that the injuries Hannah sustained could have been the result of a play time accident, and that premature children tend to have worse motor skills. (R. 1800-09.)

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[3]During cross-examination of Dr. Levita, Appellant's attorney asked, "Isn't it true that children that are born prematurely develop differently as far as bone structure and otherwise than children that are . . . not born prematurely?" (R. 1611.) Appellant's attorney stated that a premature child's "skull that protects the brain is very thin and sensitive piece of bone for a child that age; is that correct?" (*Id.*) Appellant's attorney then asked, "[H]ow many cases have you personally been involved in where a head injury of a child had primarily resulted from the use of a force exerted by leg muscles from the lower torso of a robust male?" (R. 1619.) Appellant's attorney also asked Dr. Levita, "If a child were being thrust in the air, moved back and forth and the child were put down, would the child of 21 months or 24 months have more difficult time righting itself, in other words, preventing itself from falling and hitting its head than . . . a five-year-old child?" (R. 1620.) During cross-examination of Dr. Goldstein, Appellant's attorney asked, "[W]ould you agree with me that the leg muscles . . . are the strongest muscles in a man's body?" (R. 1659.) Appellant's attorney then asked whether a two-year-old's skull is fully developed and whether a two-year-old may be more vulnerable to trauma than a five-year-old." (R. 1661.) Appellant's attorney then asked, "[I]f a child is being thrown about in the air . . .wouldn't the two-year-old child have less of an ability to correct itself from injury as a result of that rotational motion as opposed to a five-year-old who would be more in-depth innately to kind of compensate for that rotational type of potential injury?" (R. 1662.) During cross-examination of Dr. Aronica-Pollak, Appellant's attorney asked if a child of Hannah's age and weight "would have much less dexterity" than a five-year-old. (R. 1746.) Appellant's attorney also asked if Hannah's injuries could have resulted from "rotational deceleration vertically, horizontally at variant speeds of a grown robust man on his back with a child up in the air on his feet being propelled horizontally, vertically." (R. 1757.)

[4]Appellant was asked by his attorney to stand up numerous times to illustrate his large size compared to Hannah including during Appellant's opening statement. (R. 1446.) During his direct examination, Appellant was asked to stand up in order to illustrate his size compared to Hannah's. (R. 2123.)

During Appellant's direct testimony, he offered no other explanation for Hannah's injuries. Prior to the State cross-examining Appellant, a bench conference was held to discuss the scope of cross-examination. (R. 1939.) The State noted that Appellant had testified to his good relationship with children and also offered character witnesses that indicated they would allow Appellant to be around their children. (*Id.*) In order to rebut that testimony, the State wanted "to offer evidence concerning an incident that occurred with [Appellant] and a five-year-old child on May the 8th, 2002, where he became involved in an altercation." (R. 1941.) During that incident, Appellant held the child up against the wall by the throat, causing the child to bleed and become unconscious for four to five seconds. (*Id.*) The State noted that this incident was documented by police, medical personnel and photographs. (*Id.*; *see* R. 694-735.) Additionally, the mother of the child was available to testify. (R. 1942.) The court adjourned for the day without a ruling.

The next day, the State argued that the testimony would be allowed under West Virginia Rule of Evidence 404(a)(1) in order to rebut Appellant's character witnesses who testified about Appellant's good nature with children. (R. 2023-30.) However, the trial court noted that the evidence might not be admissible under Rule 404(a) because the State would have had to cross-examine Appellant's witnesses about the prior incident, which the State did not do. (R. 2028-29.) The State then argued that the testimony of the incident should be admissible pursuant to West Virginia Rule of Evidence 404(b), "for purposes of showing not that the defendant acted in conformity therewith specifically, but to show the defendant's intent, his state of mind . . . the identity of the perpetrator . . . [and] showing that [Appellant] had deliberately inflicted serious abuse on another child . . . goes to show absence of accident in the infliction of injuries on Hannah." (R. 2031.)

Under Rule 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith." However, the second part of Rule 404(b) states that character evidence of a defendant's past acts may be

> admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

It is important to note that Rule 404(b) "is an 'inclusive rule' in which all relevant evidence involving other crimes or acts is admitted at trial unless the sole purpose for the admission is to show criminal disposition." *State v. Edward Charles L.*, 183 W. Va. 641, 647, 398 S.E.2d 123, 129 (1990).

Under West Virginia law,

> [w]hen offering evidence under Rule 404(b) of the West Virginia Rules of Evidence, the prosecution is required to identify the specific purpose for which the evidence is being offered and the jury must be instructed to limit its consideration of the evidence to only that purpose. It is not sufficient for the prosecution or the trial court merely to cite or mention the litany of possible uses listed in Rule 404(b). The specific and precise purpose for which the evidence is offered must clearly be shown from the record and that purpose alone must be told to the jury in the trial court's instruction.

Syl. Pt. 1, *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994). This Court has also held that

> [t]o satisfy the requirement to clearly show the specific and precise purpose for which evidence is offered under West Virginia Rule of Evidence 404(b), as set out in syllabus point 1 of *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994), the proponent of the 404(b) evidence must not only identify the fact or issue to which the evidence is relevant, but must also plainly articulate how the 404(b) evidence is probative of the fact or issue. If the 404(b) evidence is determined to be admissible, then a limiting instruction shall be given at the time the evidence is offered, and must be repeated in the trial court's general charge to the jury at the conclusion of the evidence.

Syl. Pt. 5, *State ex rel. Caton v. Sanders*, 215 W. Va. 755, 601 S.E.2d 75 (2004).

In this case, the State argued that the evidence of the past incident was admissible under Rule 404(b) and was particularly important to show that what happened to Hannah was not an accident. Significantly, an element of this offense that had to be proved by the State was that Hannah's death was caused "by other than accidental means." W. Va. Code § 61-8D-2a(a). Indeed, it was needed to rebut Appellant's evidence that Hannah "may have been injured by some action of [Appellant's] leg muscles" while playing "airplane." (R. 2032-33.) It also showed identity, state of mind and absence of accident because during the previous incident, Appellant was "choking that child with his leg muscles, having that child's head between his knees and squeezing the child to the extent that the child lost consciousness." (R. 2033.) The trial court then found that "this evidence would be relevant and that obviously I don't think it can be denied that it was committed, [because] he entered a plea of guilty to the charge." (R. 2035.) The State also noted that Appellant had the criminal history of the incident which clearly showed that Appellant was charged with child abuse and that charge was reduced to domestic battery against the mother. (R. 2036.) Additionally, Appellant had knowledge of the incident, and documents about the incident were public record available at the magistrate court. (R. 2037.) The prosecutor stated that "I would certainly concede had the State intended to offer this evidence in its case-in-chief we would had have to have given notice thereof." (R. 2040.) The State then argued that the evidence was offered for rebuttal purposes only because the defendant elicited testimony from at least four witnesses about whether an adult's leg muscles could injure a child during play. (R. 2041.)

> Where an offer of evidence is made under Rule 404(b) of the West Virginia Rules of Evidence, the trial court, pursuant to Rule 104(a) of the West Virginia Rules of Evidence, is to determine its admissibility. Before admitting the evidence, the trial court should conduct an *in camera* hearing as stated in *State v. Dolin*, 176 W.Va. 688, 347 S.E.2d 208 (1986). After hearing the evidence and arguments of counsel, the trial court must be satisfied by a preponderance of the evidence that the acts or

> conduct occurred and that the defendant committed the acts. If the trial court does not find by a preponderance of the evidence that the acts or conduct was committed or that the defendant was the actor, the evidence should be excluded under Rule 404(b). If a sufficient showing has been made, the trial court must then determine the relevancy of the evidence under Rules 401 and 402 of the West Virginia Rules of Evidence and conduct the balancing required under Rule 403 of the West Virginia Rules of Evidence. If the trial court is then satisfied that the Rule 404(b) evidence is admissible, it should instruct the jury on the limited purpose for which such evidence has been admitted. A limiting instruction should be given at the time the evidence is offered, and we recommend that it be repeated in the trial court's general charge to the jury at the conclusion of the evidence.

Syl. Pt. 2, *State v. McGinnis*.

The trial court then recessed to consider the matter and returned to "allow the State to proceed in regard to an *in camera* hearing concerning that issue . . . [and] the Court, of course, is going to want you to specifically state and articulate the purpose that you rely on under 404(b) to bring in that evidence." (R. 2044-45.) During the *in camera* hearing, the prosecutor stated that the evidence was being offered under Rule 404(b) "for the purposes of showing the intent of the defendant in committing the subject offense with which he is charged, to show the identity of the defendant as the individual who committed the offense with which he is charged, and also to show evidence of the absence of accident in the defendant committing the offense." (R. 2047-48.) The State also argued that offering evidence of the previous incident helps to establish the Appellant's state of mind and shows that the Appellant acted intentionally. (R. 2048.) Finally, the evidence was being introduced to "rebut the testimony of the [Appellant] as well as his character witnesses who indicated that he has a reputation . . . for peacefulness, that he is not a violent person . . . [and] that [they] have trusted him with their children." (R. 2049.)

During the *in camera* hearing, Melina Bettis, the mother of the child in the previous abuse incident, took the stand and testified that Appellant held her young child against the wall by his neck.

(R. 2055.) When she intervened, the young child fell between Appellant's squeezing knees to the point that his ear bled and a blood vessel in one of his eyes burst. (R. 2056-57.) The child was rendered unconscious for four to five seconds causing him to urinate himself. (R. 2057.)

The trial court then announced that the State had notified the defendant of its plan to use Rule 404(b) evidence, however that notice was late in that it occurred while the trial was occurring. (R. 2086.) The trial court then found by a preponderance of the evidence that the abuse incident did occur. (R. 2087.) The court then stated that the Appellant "has presented evidence that this was just basically unknown as to how this [head trauma] occurred." (*Id.*) The court then noted that the pathologist opined that the head trauma was not the result of normal playtime with a child. (R. 2088.) Thus, the lower court believed "that this evidence would go to show that this was not an accident and that it was intentional and the evidence from the prior incident which was a short period of time ago that he actually did hold this child up by its head up against the wall and also squeezed the child [between his knees] to the point that the child lost consciousness." (*Id.*) The trial court stated that it believed the prior incident "does tend to show a lack of accident and the intent." (R. 2089.)

The trial court then weighed the probative value of this evidence compared to the prejudicial effect. (*Id.*) The court found that

> under the circumstances for a limited purpose as set forth here that the probative value would, in fact, outweigh the prejudicial effect to the extent that the Court believes that the State should . . . inquire about this incident on cross-examination, but limited to this point that there would not be any inquiry concerning any conviction or charge, just the incident itself, and there would be no introduction of any pictures, reports or anything else at this time on cross-examination.

(R. 2090.) The court then noted that 404(b) indicates that "notice can be done during trial" and that "under these circumstances the Court believes there was good cause shown . . .because it was not

until the defendant brought it up through his character evidence that this even became an issue." (R. 2095.)

During Appellant's cross-examination, the State asked a number of questions about the previous child abuse incident. (R. 2124-31.) After cross-examination concluded, the trial court cautioned the jury that,

> as to certain alleged events in his past and you are instructed that such evidence is not admitted as proof of the defendant's guilt on the present charge. This evidence is admitted for a limited purpose only and it may be considered by you only in deciding whether a given issue or element relevant to the present charge has been proven.

(R. 2131-32.)

The trial court continued that "[i]n this instance the evidence may be considered only for the purpose of determining whether the State has proven and established intent and absence of accident." (R. 2132.) The trial court also stated that Appellant "is not now being tried for any of the specific acts to which this evidence relates and you should bear this fact definitely in mind." (*Id.*) The judge emphasized that "[s]uch evidence was admitted and should be considered by you only so far as in your opinion it may go to show the intent of the defendant in connection with the offense with which he is charged in this indictment." (*Id.*) The trial court then determined that the State would not be allowed to call Ms. Bettis as a rebuttal witness because the State was able to elicit the information about the prior incident from Appellant during his cross-examination. (R. 2150.)

Finally, during the instructions to the jury, the trial court again reminded jurors that testimony about Appellant's past "is not admitted as proof of the [Appellant's] guilt on the present charge. This evidence is admitted for a limited purpose only . . . [to] be considered only for the purpose of determining whether the . . . State . . . has proven and established intent in absence of accident." (R. 2164-65.) The trial court then reminded the jury that the Appellant "is not now being tried for any

of the specific acts to which this evidence relates and you should bear this fact definitely in mind." (R. 2165.)

> The standard of review for a trial court's admission of evidence pursuant to Rule 404(b) involves a three step analysis. First, we review for clear error the trial court's factual determination that there is sufficient evidence to show the other acts occurred. Second, we review *de novo* whether the trial court correctly found the evidence was admissible for a legitimate purpose. Third, we review for an abuse of discretion the trial court's conclusion that the "other acts" evidence is more probative than prejudicial under Rule 403.

State v. LaRock, 196 W. Va. 294, 310-11, 470 S.E.2d 613, 629-30 (1996).

In this case, the trial court did not commit clear error in its factual determination that sufficient evidence existed to show that the other act occurred. During the bench conference to discuss the scope of Appellant's cross-examination, the State noted that the previous child abuse incident was documented by police, medical personnel and photographs. (R. 1941.) Additionally, during the *in camera* hearing, the mother of the child testified about the incident and was subject to Appellant's cross-examination. The court noted that "obviously I don't think it can be denied that it was committed, [because] he entered a plea of guilty to the charge." (R. 2035.) Furthermore, during Appellant's cross-examination, Appellant did not deny that the incident occurred but instead stated that "I consider it a misunderstandable thing that just happened." (R. 2125.) Thus, the trial court did not commit clear error in its factual determinations that the incident occurred because there was sufficient proof to satisfy by a preponderance of the evidence that the previous incident did in fact occur.

Under a *de novo* standard, the trial court did not commit reversible error by admitting the evidence of the prior child abuse because the evidence was offered for a legitimate purpose. Throughout the case, Appellant maintained that he did not know how Hannah's injuries occurred.

Appellant offered a number of theories about the possible source of the injuries including that the dog had knocked over Hannah, that she had fallen off the deck, or that the game of "airplane" had caused the injuries because her skull was weak due to her premature birth. To counter Appellant's theories, the State sought to introduce evidence of the previous incident in order to show identity, absence of mistake, and lack of accident. Indeed, the trial court reasoned that the evidence "would go to show that this was not an accident and that it was intentional" and evidence of the prior incident "does tend to show a lack of accident and the intent." (R. 2088-89.)

Finally, the trial court did not abuse its discretion by allowing cross-examination about the previous child abuse because the incident was more probative than prejudicial under West Virginia Rule of Evidence Rule 403. "The balancing of probative value against unfair prejudice is weighed in favor of admissiblity and rulings thereon are reviewed only for an abuse of discretion." *State v. LaRock*, 196 W. Va. at 312, 470 S.E.2d at 631. In considering the prejudicial effect of prior bad acts, this Court "applies a reasonableness standard and examines the facts and circumstances of each case." (*Id.*) The Court has further stated that "[u]nfair prejudice does not mean damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggests decision on an improper basis." (*Id.*) Furthermore, "we review the trial court's decision to admit evidence pursuant to Rule 404(b) under an abuse of discretion standard." *State v. McGinnis*, 193 W. Va. at 159, 455 S.E.2d at 528. "Our function on . . . appeal is limited to the inquiry as to whether the trial court acted in a way that was so arbitrary and irrational that it can be said to have abused its discretion." (*Id.*) Finally, Rule 404(b) evidence is reviewed "in the light most favorable to the party offering the evidence . . . maximizing its probative value and minimizing its prejudicial effect." (*Id.*)

In this case, the trial court did not abuse its discretion because its actions were not arbitrary and irrational. The trial court performed a balancing test to determine if cross-examination of the previous incident would be admitted. The trial court allowed the testimony because it was particularly relevant to proving the identity of the perpetrator, the absence of mistake, and intent. The court also forbade the prosecution from calling the mother of the child involved in the incident to the witness stand, and also prohibited introduction of evidence that Appellant had been convicted and served jail time for the incident. Finally, the trial court issued limiting instructions during the cross-examination and again during the general charge to the jury reminding them that Appellant was not on trial for the previous incident, and that the previous incident was only to be considered for the purpose of establishing the identity of the perpetrator, absence of mistake and intent.

Because of the prejudicial effect inherent in admitting evidence of other crimes, this Court has adopted an additional test to ensure that the defendant is tried for what he or she did, not for who he or she is. Thus, when determining "whether evidence is admissible under Rule 404(b), the trial court must utilize the four-part analysis set forth . . . in *Huddleston*." *State v. McGinnis*, 193 W. Va. at155, 455 S.E.2d at 524. Under this context,

> [i]t is presumed a defendant is protected from undue prejudice if the following requirements are met: 1) the prosecution offered the evidence for a proper purpose; 2) the evidence was relevant; 3) the trial court made an on-the-record determination under Rule 403 of the West Virginia Rules of Evidence that the probative value of the evidence is not substantially outweighed by its potential for unfair prejudice; and 4) the trial court gave a limiting instruction.

Syl. Pt. 3, *State v. LaRock, supra* (citing *Huddleston v. United States*, 485 US. 681, 691-92, 108 S. Ct. 1496, 1502 (1988)).

Under this test, Appellant was not unfairly prejudiced by allowing cross-examination of the previous child abuse incident. The evidence was offered for a proper purpose in that it helped

establish the identity of the perpetrator, absence of mistake and intent. The evidence was relevant because the child abuse incident occurred only two years before the incident with Hannah. The trial court made an on-the-record Rule 403 determination that the probative value of the evidence was not substantially outweighed by its potential for unfair prejudice. (R. 2089-90.) Finally, the trial court gave limiting instructions both before the cross-examination of the Appellant, and again at the end of the trial during the court's general instructions to the jury. (R. 2132, 2164-65.)

Appellant cites Syl. Pt. 2, *State v. Grimm*, 165 W. Va. 547, 270 S.E.2d 173 (1980), for the proposition that "non-disclosure by the prosecution is fatal to its case where such non-disclosure is prejudicial. The non-disclosure is prejudicial where the defense is surprised on a material issue and where the failure to make the disclosure hampers the preparation and presentation of the defendant's case." (Appellant's Brief at 5-6.) That test, however, is not relevant to the present case. It is important to note that the first part of Syl. Pt. 2 of *Grimm* states that "[w]hen a trial court grants a pre-trial discovery motion requiring the prosecution to disclose evidence in its possession," non-disclosure can be fatal.

In this case, there was not a pre-trial discovery motion dealing with Rule 404(b) issues because the State did not offer Rule 404(b) evidence during its case-in-chief. Indeed, during two different pre-trial conferences the State indicated that it did not intend to offer Rule 404(b) evidence. (R. 1220, 1309-10.) However, after Appellant raised the issue that Hannah's injuries were the result of an accident, the State used the Rule 404(b) evidence during Appellant's cross-examination to demonstrate that the injuries to Hannah were not the result of an accident. The trial court noted that Rule 404(b) allows for late notice of intention to introduce Rule 404(b) evidence, and that in this

case late notice would be allowed because Appellant had introduced evidence that Hannah's injuries were the result of an accident. (R. 2095.)

Appellant also cites *State v. Miller*, 178 W. Va. 618, 624, 363 S.E.2d 504, 510 (1987), for the two-prong inquiry required of *State v. Grimm* as "1) did the non-disclosure surprise the defendant on a material fact, and 2) did it hamper the preparation and presentation of the defendant's case." (Appellant's Brief at 6.) However, a careful reading of that case reveals that it also dealt with possible violations of pre-trial discovery orders. Indeed, *Miller* specifically deals not with Rule 404(b), but with the pre-trial notice required for Rule 16 of the West Virginia Rules of Criminal Procedure. Rule 16 largely deals with providing a criminal defendant with any statements or recordings that they have made.

The trial court also did not violate West Virginia Rule of Evidence 609(a) which provides, "[f]or the purpose of attacking the credibility of a witness accused in a criminal case, evidence that the accused has been convicted of a crime shall be admitted but only if the crime involved perjury or false swearing." In this case, the State did not attempt to attack the credibility of Appellant with conviction of another crime. Instead, the evidence of the previous child abuse incident was used under Rule 404(b) to show lack of accident and the identity and intent of the perpetrator. Additionally, Rule 609(a) is not applicable because the State did not introduce evidence that Appellant had been convicted, or even arrested, for the previous incident. Indeed, when the trial court ruled that the evidence was admissible pursuant to Rule 404(b), the trial court expressly ruled that it could only be brought forward during Appellant's cross-examination and "there would not be any inquiry concerning any conviction or charge, just the incident itself, and there would be no introduction of any pictures, reports or anything else at this time on cross-examination." (R. 2090.)

Thus, evidence of the prior child abuse incident was proper under Rule 404(b) in order to rebut Appellant's claim that Hannah was injured due to an accident. The tests found in *Grimm* and *Miller* deal with pre-trial discovery orders. These tests can be used in Rule 404(b) cases where the trial court has issued pre-trial discovery orders. *See State v. Graham*, 208 W. Va. 463, 541 S.E.2d 341 (2000). However, because this case does not involve Rule 404(b) pre-trial discovery orders, the proper tests in dealing with Rule 404(b) issues of this kind are found in *State ex rel. Caton v. Sanders*, *LaRock*, and *McGinnis*. As discussed above, the lower court properly followed these procedures in allowing the introduction of Rule 404(b) evidence to rebut Appellant's claim that the injury was caused by an accident.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ALLOWED CROSS-EXAMINATION OF SHILOH AUMOCK REGARDING AN INCIDENT THAT OCCURRED AT A COMPANY CHRISTMAS PARTY WHICH RESULTED IN APPELLANT LOSING HIS JOB, BECAUSE TESTIMONY ABOUT APPELLANT'S JOB STATUS AND GOOD FAMILY LIFE WERE RAISED DURING APPELLANT'S DIRECT EXAMINATION OF WITNESSES.

During Appellant's case-in-chief, he elicited testimony from several witnesses as to Appellant's good work habits and good relationship with children. During direct examination, Appellant's father (hereinafter "Mr. Mongold") testified that Appellant had a reputation for peacefulness and maintained a good relationship with Ms. Aumock and the children and that they were "just two people and a family that was together and was in love." (R. 1846.) Mr. Mongold also testified that he and Appellant were employed together with Lantz Construction Company, and worked early in the morning until late in the day. (R. 1847-48.) On cross-examination, the State asked Mr. Mongold if Appellant still worked with him. (R. 1861.) Appellant objected to the relevancy of the question, however the court ruled that Mr. Mongold could answer the question since

he had previously indicated he and Appellant worked together. (*Id.*) Mr. Mongold answered that Appellant had been terminated because he had missed a lot of work. (*Id.*)

Appellant's attorney then re-questioned Mr. Mongold and asked, "[Appellant] wasn't terminated, let go for misconduct, was he?" (R. 1862.) Mr. Mongold responded, "Not on the job site. They had a Christmas party and something happened there. I was not there." (*Id.*) The State then re-cross-examined Mr. Mongold and asked if Appellant was terminated from work due to an incident at the Lantz Construction Christmas party. (*Id.*) Mr. Mongold stated, "I understand that there was a Christmas party; and there was some other people that was involved and there was some drinking going on, and that's all I know about it." (*Id.*)

During direct-examination of Ms. Aumock, Appellant's attorney asked her twice if she was married to Appellant. (R. 1873.) Ms. Aumock was also asked by Appellant's attorney if Appellant had a job when she and Appellant moved in together. (R. 1876.) Ms. Aumock stated that Appellant had been employed at Lantz Construction. (*Id.*) Appellant's attorney continued by asking what hours Appellant typically worked. (*Id.*)

During cross-examination of Ms. Aumock, the State asked about Appellant losing his job. (R. 1901.) The court ruled that the prosecutor could "cross-examine her about any incident at the party that was brought out by the father." (R. 1895.) Ms. Aumock responded that he lost his job because "[Appellant] and I had gotten into an argument at a company dinner and he was being nasty to me." (R. 1902.) Ms. Aumock did not want to argue with Appellant; however, he "restrain[ed] me so that I couldn't walk away." (*Id.*) Ms. Aumock stated that several people confronted Appellant about his behavior and a fight broke out which resulted in Appellant punching a hole into the wall.

(*Id.*) Appellant was then fired and the company did not press charges. (*Id.*) During Appellant's direct examination he gave a similar account of the Christmas party incident. (R. 1929-31.)

Under West Virginia Rule of Evidence 611(b)(2), cross-examination of non-party witnesses "should be limited to the subject matter of the direct examination and matters affecting the credibility of the non-party witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination." Under West Virginia law, "[t]he extent of the cross-examination of a witness is a matter within the sound discretion of the trial court; and in the exercise of such discretion, in excluding or permitting questions on cross-examination, its action is not reviewable except in the case of manifest abuse or injustice." Syl. Pt. 12, *State v. McIntosh*, 207 W. Va. 561, 534 S.E.2d 757 (2000); *see also* Syl. Pt. 4, *State v. Carduff*, 142 W. Va. 18, 93 S.E.2d 502 (1956); Syl., *State v. Wood,* 167 W. Va. 700, 280 S.E.2d 309 (1981). West Virginia law also provides that

> [s]everal basic rules exist as to cross-examination of a witness. The first is that the scope of cross-examination is coextensive with, and limited by, the material evidence given on direct examination. The second is that a witness may also be cross-examined about matters affecting his credibility. The term 'credibility' includes the interest and bias of the witness, inconsistent statements made by the witness and to a certain extent the witness' character. The third rule is that the trial judge has discretion as to the extent of cross-examination.

Syl. Pt. 11, *State v. McIntosh*; *see also* Syl. Pt. 4, *State v. Richey*, 171 W. Va. 342, 298 S.E.2d 879 (1982).

In this case, asking Ms. Aumock about the Christmas party incident was within the scope of the direct testimony she provided to Appellant's counsel. Indeed, Appellant's counsel had asked Ms. Aumock about Appellant's relationship with the children, her relationship with Appellant, and about Appellant's work history. Appellant's counsel had also asked similar questions about Appellant's

family life and work history during direct-examination of Appellant and Mr. Mongold. In order to give the jury a complete and accurate picture of Appellant's family life, the trial court allowed introduction of the Christmas party incident. Even if introduction of the Christmas party incident was outside the scope of Ms. Aumock's direct testimony, the trial court properly used its broad discretion in allowing the State to cross-examine her about the incident. Rule 611(b) states that the trial court may exercise discretion and "permit inquiry into additional matters as if on direct examination." In this case, allowing testimony of the Christmas party incident was important to rebut Appellant's contentions that family life was good. It was also relevant because Appellant and his father had testified about Appellant's positive family life and work habits.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ADMITTED AUTOPSY PHOTOGRAPHS OF HANNAH INTO EVIDENCE BECAUSE THE PHOTOGRAPHS WERE RELEVANT IN ILLUSTRATING THE INJURIES HANNAH SUFFERED, AND THEIR HIGH PROBATIVE VALUE IN AIDING THE PATHOLOGIST'S TESTIMONY OUTWEIGHED ANY PREJUDICIAL EFFECT TO APPELLANT.

In this case, the issue of the autopsy photographs occupied a considerable amount of court time. At a January 26, 2005, pretrial hearing, Appellant first objected to the State's desire to introduce black and white autopsy photographs. (R. 1239.) The trial court requested that both parties provide the court with case law in support of their position before making a ruling. (R.1241-42.) Appellant then requested that the State provide a written report from the pathologist indicating that her testimony could not be properly presented without the photographs and that an anatomical model or testimony alone would not adequately address her testimony. (R. 1243.) On March 15, 2005, the Appellant filed an additional motion in limine arguing that the photographs should not be admitted into evidence because of a lack of probative value. (R. 489-90.)

During another pretrial hearing on March 17, 2005, the State informed the court and opposing counsel of its intent to use autopsy photographs to aid in the testimony of Dr. Aronica-Pollak, the medical examiner who performed Hannah's autopsy. (R. 1254.) The State also gave the trial court a letter from Dr. Aronica-Pollak indicating her need to use the photographs during her testimony. (R. 1257.) The State then recommended that Exhibit A, the pre-autopsy photograph of Hannah with various medical devices and bandages still attached to her from the hospital's attempts to save her life, would not be introduced as evidence unless it became relevant during the course of trial. (R. 1255.)

The State then discussed the importance of Exhibit B, a photograph of Hannah with part of her head shaven to expose exterior evidence of trauma, which Hannah's doctors had been unable to see due to obstruction from her hair. (R. 1258.) Exhibit B also showed a large bruise on Hannah's calf that doctors indicated was in an unusual place. (R. 1258-59.) Appellant argued that Exhibit B was inflammatory and that an anatomical model could be used to illustrate the child's injuries. (R. 1260.)

The State then explained that Exhibit C, a frontal picture of Hannah, was important to its case because it showed marks on the child's arm that could be consistent with grab marks. (R. 1264.) Appellant argued that the photographs were inflammatory and not probative and that many of the bruises shown in the photograph could have been a result of the medical treatment Hannah received before her death. (R. 1265-66.) The State countered that the photograph was probative because there would be testimony discussing the size of Hannah's bruises in terms of centimeters, which might sound small to the jury if they were unable to see how even a small bruise was large on Hannah's small body. (R. 1270.)

The trial court then discussed Exhibit D, which was a picture of the back of Hannah's skull. The trial judge had already cropped the picture in order to make the photograph appear less gruesome. (R 1272.) Exhibit D was important to the State's case because it showed bruising on Hannah's brain which corresponded to the head injuries observed on Hannah's skin in Exhibit B. (R. 1273.) Exhibit D also showed evidence of brain swelling and illustrated areas of internal injury that corresponded to external injuries found in Exhibit B. Additionally, Exhibit E, which showed the reflected scalp of the front portion of the head, was important because it illustrated Hannah's additional injuries in a way that other photographs did not. (R. 1276-77.)

The State advanced additional reasons why the photographs were admissible as probative evidence. First, the State argued that it had the burden of proving the defendant's guilt beyond a reasonable doubt, and that the photographs were the best evidence of the injury. (R. 1275.) The State then argued the medical examiner's testimony would appear discredited to the jury if they testified to injuries they witnessed without being able to show the jury the injuries via photograph. (R.1275-76.)

Under current West Virginia law, "[t]he admissibility of photographs over a gruesome objection must be determined on a case-by-case basis pursuant to Rules 401 through 403 of the West Virginia Rules of Evidence." Syl. Pt. 8, *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994). Additionally,

> Rule 401 of the West Virginia Rules of Evidence requires the trial court to determine the relevancy of the exhibit on the basis of whether the photograph is probative as to a fact of consequence in the case. The trial court then must consider whether the probative value of the exhibit is substantially outweighed by the counterfactors listed in Rule 403 of the West Virginia Rules of Evidence. As to the balancing under Rule 403, the trial court enjoys broad discretion. The Rule 403 balancing test is essentially

> a matter of trial conduct, and the trial court's discretion will not be overturned absent a showing of clear abuse.

Syl. Pt. 10, *State v. Derr*.

The trial court then followed the guidance of *Derr* in determining whether the photographs would be admissible. (R. 1279.) Rule 401 of the West Virginia Rules of Evidence "defines relevant evidence in terms of probability. The relevant inquiry is whether a reasonable person, with some experience in the everyday world, would believe that the evidence might be helpful in determining the falsity or truth of any fact of consequence." *State v. Derr*, 192 W. Va. at 178, 451 S.E.2d at 744; *see generally Young v. Saldanha*, 189 W. Va. 330, 336, 431 S.E.2d 669, 675 (1993). The trial court found that the photographs were relevant under Rule 401 because they showed the injuries and their location and would be helpful for the medical examiner's testimony. (R. 1280.) The trial court then ruled that Exhibit A, which showed Hannah's body with various medical devices used in her rescue attempt, would not be admissible. (R. 1285-86.) The trial court then ruled that Exhibit B and C would be admitted because their probative value "would far outweigh any prejudicial effect to the defendant" because it showed the injuries that the medical examiner would testify about. (R. 1286.)

The trial court then examined the post autopsy photographs and noted that under *Derr*, which overruled the previously used "gruesome" standard, the post-autopsy photographs are likely admissible. (R. 1287-88.) The trial court then invited Appellant to find case law in support of the proposition that post-autopsy photographs cannot be used. (*Id.*) The trial court also cropped Exhibits D, E, and F to only focus on the injury without exposing unnecessary amounts of Hanna's body in order to ensure that the probative value of the pictures outweighed any prejudicial effect. (R. 1288.)

During trial, discussion of the photograph admissibility continued. The court again looked at Rule 401 to determine whether the photographs were relevant. (R. 1399.) The trial court noted that relevancy required "whether a reasonable person with some experience in the everyday world would believe that the evidence might be helpful in determining the falsity or truth of any fact or consequence." (*Id.*) The trial court ruled that the photographs "are relevant because they do demonstrate the fact that the child was injured, that those injuries caused her death, and because the photos show the size, location, shape and severity of the exterior as well as the interior injuries." (R. 1400.) Because the photographs were relevant, they were properly admissible as evidence. Indeed, Rule 402 of the West Virginia Rules of Evidence, provides that all relevant evidence is admissible and "[t]he general rule is that pictures or photographs that are relevant to any issue in a case are admissible." *Roberts v. Stevens Clinic Hospital, Inc.*, 176 W. Va. 492, 497, 345 S.E.2d 791, 796 (1986).

After the trial court determined that the photographs were relevant, it undertook the Rule 403 balancing test to "weigh the probative value against the prejudicial nature of the exhibit." (R. 1400.)

> Although Rules 401 and 402 of the West Virginia Rules of Evidence strongly encourage the admission of as much evidence as possible, Rule 403 of the West Virginia Rules of Evidence restricts this liberal policy by requiring a balancing of interests to determine whether logically relevant is legally relevant evidence. Specifically, Rule 403 provides that although relevant, evidence may nevertheless be excluded when the danger of unfair prejudice, confusion, or undue delay is disproportionate to the value of the evidence.

Syl. Pt. 9, *State v. Derr*. The court noted that under Rule 403, relevant evidence can be excluded if its prejudicial impact outweighs the probative value. (R. 1400.) The trial court then followed *Derr* and performed a case-by-case analysis of the photographs to test their probative value versus the prejudicial impact. (*Id.*)

The court then noted that "in none of these pictures are there any indication of blood or anything like that and they are all black and white." (R. 1400-01.) The court also stated that "[i]f the exhibit is the only available evidence, its probative value is high." (R. 1401.) As such, the court determined that

> the prosecutor will have witnesses testify about the condition of the child and her injuries. Since the testimony will directly relate to the photographs and may be of a technical nature and because the charge is child abuse by custodian resulting in death of a child which requires proof of an intentional and malicious infliction of physical pain and impairment of physical condition other than by accidental means causing death, the court finds that the probative value outweighs the prejudicial effect on photographs B, C, D, E, and F.

(*Id.*)

The court realized that "autopsy photos D, E, and F are disturbing . . . however, because the photos illustrate internal injuries that would not be apparent from photos of the exterior of the body and because it is alleged that these internal injuries caused the death of the child, the Court finds that the probative value outweighs the prejudicial value." (R. 1402.) The court then ordered that photographs D, E and F "be cropped before presenting them to the jury." (*Id.*) The Court then ruled that the State must choose using either Exhibit E or F. (R. 1403.) However, the court subsequently overruled this and allowed the State to use both photographs because each photograph illustrated different injuries to Hannah. (R. 1675-76.)

During testimony at trial, Dr. Aronica-Pollak, the medical examiner who performed Hannah's autopsy, stated that the photographs accurately depicted the condition of Hannah. (R. 1714.) The doctor also stated that the photographs would aid her in describing Hannah's various internal head injuries. (R. 1715.) Additionally, Dr. Aronica-Pollak testified that the use of photographs was common in her field and such photographs were not taken for any sort of "shock value" or

"emotional value." (*Id.*) The doctor also testified that the photographs were important for clinical purposes because they show and document the injuries. (R. 1716.) Throughout her testimony, Dr. Aronica-Pollak regularly referred to the exhibits while explaining to the jury about the injuries that Hannah suffered. (R. 1716-1728.)

After the State rested its case, Appellant again objected to the use of the photographs in the State's case-in-chief. (R. 1779.) The trial court overruled this objection and noted that "I would say particularly now since the doctor has testified, it is obvious that they (photos) were needed by the . . . pathologist to amplify her testimony and to illustrate it better." (R. 1780.) The court also reasoned that "I don't believe that it could have been illustrated to the jury without those photographs. The photographs were cropped so that at least in the Court's eyes, that they were more clinical looking than what they would have been otherwise." (*Id.*)

The Rule 403 balancing test adequately protects a defendant's criminal trial by prohibiting inflammatory, prejudicial, or irrelevant photographs from reaching the jury. *State v. Derr*, 192 W. Va. at 178 n.14, 451 S.E.2d at 744 n.14. In the past, autopsy photographs were regularly excluded because they were deemed too gruesome for juries. However, it is now largely agreed that

> [g]ruesome photographs simply do not have the prejudicial impact on jurors as once believed by most courts. 'The average juror is well able to stomach the unpleasantness of exposure to the facts of a murder without being unduly influenced. . . . [G]rusome or inflammatory pictures exist more in the imagination of judges and lawyers than in reality.'

Id., 192 W. Va. at 177 n.12, 451 S.E.2d at 743 n.12 (citing *People v. Long*, 38 Cal. App.3d 680, 689, 113 Cal. Rptr. 530, 537 (1974)). Additionally,

> [a]s a general rule photographs of persons, things, and places, when duly verified and shown by extrinsic evidence to be faithful representations of the objects they purport to portray, are admissible in evidence as aids to the jury in understanding the evidence; and whether a particular photograph or groups of photographs should be

the question of the admissibility of such evidence will be upheld unless it clearly appears that its discretion has been abused.

Syl. Pt. 1, *Thrasher v. Amere Gas Utilities Co.*, 138 W. Va 166, 75 S.E.2d 376 (1953).

During the Rule 403 balancing test analysis, a trial court should look at several factors in order to test whether to allow the photograph to be introduced into evidence. These factors include "whether the photograph was black and white, whether there was blood and gore, or whether there was a mangled and distorted face or body." *State v. Derr*, 192 W. Va. at 178 n.14, 451 S.E.2d at 744 n.14. In this case, the trial court analyzed these factors when it allowed the photographs to be introduced. Indeed, Doctor Aronica-Pollak testified that the photographs were taken in black in white for the specific purpose of diminishing their "shock" or "emotional" value. (R. 1715.) Additionally, although any photograph of a dead child is disturbing, the pictures of Hannah's autopsy did not depict large amounts of blood or gore and the photographs were cropped in an attempt to make them look even less gruesome. Many other courts have allowed introduction of pictures of a child's autopsy.[5]

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[5] *See Flores v. State*, 120 P.3d 1170, 1180 (Nev. 2005) (trial court did not abuse its discretion by admitting four autopsy photographs, depicting the skull, scalp, and peeled-back face of (child) victim); *State v. Messino*, 876 A.2d 818, 832-33 (N.J. 2005) (possible prejudicial effect of showing mother autopsy photographs of her child did not substantially outweigh the probative value of the evidence, and thus, photographs were admissible in murder prosecution); *Prible v. State*, 175 S.W.3d 724,733-37 (Tex. Crim. App. 2005) (probative value of evidence of deaths of three children was not substantially outweighed by danger of unfair prejudice); *Miller v. State*, 593 S.E.2d 659, 661-62 (Ga. 2004) (post-autopsy photographs of child admissible if necessary to show some material fact that becomes apparent only due to the autopsy); *State v. Vrabel*, 790 N.E.2d.303, 317 (Ohio 2003) (trial court did not abuse discretion in admitting autopsy photographs of mother and child because the pictures illustrated the coroner's testimony describing the fatal gunshot wounds and helped prove the killer's intent and lack of accident or mistake); *State v. Gholston,* 35 P.3d 868, 879-80 (Kan. 2001) (autopsy photographs of children admissible to illustrate the nature of the wounds inflicted and to corroborate the testimony of witnesses or are relevant to the testimony of a pathologist as to the cause of death.); *United States v. Boise*, 916 F.2d 497, 504 (Or. 1990) (admission of autopsy photographs in prosecution of defendant for killing his six-week-old son did not constitute an abuse

When making a Rule 403 balancing determination, trial judges should exclude gruesome photographs when they "are offered with only slight probative value" or because "their prejudicial nature are likely to arouse passion and anger." *State v. Derr*, 192 W. Va. at 178 n.14, 451 S.E.2d at 744 n.14. However, as the trial court noted, the photographs were extremely probative in this case because they helped Dr. Aronica-Pollak illustrate her testimony and because the photographs showed injuries that could not be seen prior to the autopsy. The photographs were essential in illustrating that the vast amount of injuries that Hannah had suffered resulted from a large amount of trauma inconsistent with a playtime accident. The trial court did not abuse its discretion by allowing the photographs to be introduced as evidence.

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of discretion); *Riggs* v. *State*, 3 S.W.3d 305, 318-19 (Ark. 1999) (autopsy photographs of two child victims admissible in assisting the medical examiner explain the cause of death); *State v. Ohnstand,* 359 N.W.2d. 827, 839-40 (N.D. 1984) (trial court did not abuse its discretion in admitting three color photographs of a child's skull after the scalp had been deflected back during autopsy because the physician testified that it would be easier to show the skull fracture rather than attempt to describe it, the subject matter in the photographs was relevant and necessary to furnish a visual aid to the jury to illustrate the nature and extent of the fracture at the time of the autopsy).

V.

CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court of Hampshire County should be affirmed by this Honorable Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James W. Wegman, Assistant Attorney General for the State of West Virginia, do hereby certify that a true copy of the foregoing "Brief of Appellee State of West Virginia" was served upon counsel for the Appellant by depositing the same postage prepaid in the United States mail, this 9th day of February, 2007, addressed as follows:

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